

LEGAL, REGULATORY & POLICY UPDATE

PENSIONS AND SUPERANNUATION

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- Privacy and Data Breaches



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IN BRIEF

The **Commonwealth Budget** was the second for 2022, and thankfully, the second quiet budget for superannuation trustees. Parliament is still to pass important bills concerning the **Financial Accountability Regime**, **downsizer contribution scheme** broadening, and an **alternative performance test for faith-based products**.

Information security remains an ever-increasing regulatory focus, while APRA continues to engage with trustees as part of its ongoing **superannuation data transformation project**.

There was also an important court decision, which will make those involved in negotiating the terms of a **successor fund transfer** sleep a little easier.

COMMONWEALTH PARLIAMENT



Superannuation Bills

October 2022
Parliamentary Business

[LINK TO DETAILS](#)

Status key

- House of Reps
- Committee
- Senate
- Royal assent

Commonwealth Parliament returned for the **budget sittings** from 25-27 October. One new Bill that may affect superannuation trustees was introduced to Parliament, and referred to committees:

- [Privacy Legislation Amendment \(Enforcement and Other Measures\) Bill](#).

The **downsizer contribution** related bills remain before the Senate:

- [Social Services and Other Legislation Amendment \(Incentivising Pensioners to Downsize\) Bill](#); and
- [Treasury Laws Amendment \(2022 Measures No. 2\) Bill](#).

The Senate Economics committee issued its report on the package of Bills related to the **Financial Accountability Regime (FAR)** and **Compensation Scheme of Last Resort (CSLR)**:

- [Financial Accountability Regime Bill](#);
- [Financial Sector Reform Bill](#);
- [Financial Services Compensation Scheme of Last Resort Levy Bill](#);
- [Financial Services \(CSLR\) Levy \(Collection\) Bill](#).

The Bill containing the alternative MySuper annual performance assessment for **faith-based products** remains before the Senate Economics Committee, with a report due 17 November:

- [Treasury Laws Amendment \(2022 Measures No. 3\) Bill](#).

The motion to disallow recent amendments to the **Annual Member Meeting Notice** disclosure requirements pursuant to *Superannuation Industry (Supervision) Amendment (Annual Members' Meetings Notices) Regulations 2022* was unsuccessful.



Privacy Law Penalties

26 October 2022
New Bill

[LINK TO DETAILS](#)

The *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022* was introduced to Parliament and referred to the Senate Legal & Constitutional Affairs Committee, with a report due by 22 November.

The Bill would **increase penalties** under the *Privacy Act* for serious or repeated interferences with privacy.

The maximum penalty for a corporate entity will increase to the greater of \$50 million; three times the value of the benefit obtained; or, if the court cannot determine the value of the benefit, 30% of their adjusted turnover.

Superannuation trustees should consider the impact of the changes to the severity aspect of any privacy law related risk assessments, where non-compliance may result in penalties.



Inquiry into ASIC's Capacity and Capability

26 October 2022
Inquiry

[LINK TO DETAILS](#)

The *Parliamentary Joint Committee on Corporations and Financial Services* has commenced an inquiry into the capacity and capability of the Australian Securities and Investments Commission (ASIC) to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct.

The terms of reference of the inquiry include:

- the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action;
- the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;
- opportunities to reduce duplicative regulation; and
- the effectiveness of ASIC's enforcement measures in protecting vulnerable Australians.

The Committee is yet to call for submissions but must finalise its report by no later than June 2024.

Superannuation trustees should review the consultation paper once it is released. Being ASIC regulated entities, superannuation trustees may be well placed to assist the committee in identifying opportunities to improve the efficiency of responding to enforcement activity, and opportunities to reduce duplicate regulation and to better protect vulnerable members.



WA De Facto Super Splitting

10 October 2022
Determination

[LINK TO DETAILS](#)

The *Social Security Amendment (Family Law—Western Australia De Facto Superannuation Splitting) Determination 2022* was made to effect necessary consequential amendments in response to the commencement of the *Family Court Amendment Bill 2022 (WA)* on 28 September 2022.

The Determination amends several instruments relating to valuing superannuation income streams for the purposes of the social security means test. The value of a family law affected income stream may be assessable under both the income and assets test.

The Determination also amends various social security legislative instruments to insert references to orders that will be made under new Part VIII C of the *Family Law Act 1975* where the instruments currently refer to Part VIII B.

Superannuation trustees should ensure that any guidance or information provided to members is updated to reflect these changes.



DELEGATED LEGISLATION & REGULATIONS



Telecommunications Regulations – Data Sharing

11 October 2022
Legislative Instrument

[LINK TO DETAILS](#)

The Federal Executive Council made the *Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022* which amends the *Telecommunications Regulations 2021* to remove legal barriers restricting telecommunications carriers from disclosing government identification data to APRA regulated entities in limited circumstances.

The amendments were in response to the recent Optus data breach and permit carriers to securely disclose government identifiers to financial services entities and government agencies. The information that can be shared is limited to the government identification particulars affected by the breach but does not include other personal details such as names.

In order to obtain the government identifier particulars, superannuation trustees must:

- make a written request for the specified information;
- explicitly state the information is required for the sole purpose to prevent, respond to or respond to the consequences of a cyber security incident, fraud, scam activity or identity theft;
- make a written commitment to the Australian Competition and Consumers Commission (ACCC) that the entity will use the information appropriately; abide by the *Privacy Act*; review the need for the information every 12 months and destroy the information where it is deemed no longer necessary; and abide by the principles and requirements of CPS 234 Information Security.

The Regulations commenced on 12 October and sunset after 12 months.

Superannuation trustees should consider whether a written application is warranted in relation to mutual member data. Accessing the data may be useful in flagging identification documents which may be exposed to a heightened risk of fraud.



Medibank Data Breach

24 October 2022
APRA Update

[LINK TO DETAILS](#)

APRA released an update for all APRA-regulated entities in relation to the recent cyber-attack reported by Medibank which resulted in a data breach.

APRA urged entities employing online application and policy transaction processes to strengthen verification controls and increase vigilance on avenues of potential fraud, including the use of credit card information.

APRA reminded entities to ensure information security controls are in place in accordance with CPS 234 Information Security.

APRA also encouraged entities to communicate with customers to raise awareness of ways to limit fraud, including to direct customers to reputable sources such as the Australian Cyber Security Centre, ASIC's Moneysmart and the Office of the Australian Information Commissioner.

Superannuation trustees should note APRA's guidance and consider appropriate actions to communicate with members in relation to cyber security and how to protect themselves. Consideration should also be given to working with service providers to determine whether additional safeguards can be implemented to further protect member data.



APRA Revocation of Reporting Standards

17 October 2022
Letter to RSE Licensees

[LINK TO DETAILS](#)

APRA issued a letter to RSE licensees setting out the status of pre-Superannuation Data Transformation (SDT) reporting standard obligations that overlap with Phase 1 reporting standards. As confirmed within APRA's Response Paper to consultation on Phase 2 of the SDT, APRA is phasing out the duplicate reporting obligations currently in place:

- *SRS 533.1 Asset Allocation and Member Benefit Flows* and *SRS 250.0 Acquired Insurance* – 30 June 2022 will be the last reporting period;
- *SRS 703.0 Fees Disclosed* – 30 June 2022 will be the last annual reporting period, however RSE licensees will be required to report any changes within 28 calendar days of the change, and submit an ad-hoc *SRF 703.0* in D2A for changes up to and including 1 October 2022; and
- APRA is undertaking a data quality review of *SRS 530.0 Investments* and *534.0 Derivative Financial Instruments*; where the quality of reporting is sufficient, APRA will revoke the reporting standards, however RSE licensees will still need to report under these standards for the quarter ending 30 September 2022.

APRA also confirmed that four pre-SDT reporting standards have a partial overlap with Phase 1 reporting standards and will be prioritised for consultation under Phase 2 to allow APRA to revoke the reporting standards in future.

Superannuation trustees should ensure internal reporting teams and those with external service providers are aware of the updates and can make the necessary changes. Consideration should be given to whether the trustee wishes to seek an exemption for the standards where there is overlap.



APRA Group Regulation Framework

24 October 2022
Announcement

[LINK TO DETAILS](#)

APRA announced a multi-year roadmap for the review of the prudential framework for APRA-regulated 'group' entities. The aim of the review is to ensure that the framework is fit for purpose to cater to an increasing array of new groups, and consistently applied to existing structures to ensure a level playing field. The following objectives of the review are:

- **Rationalising requirements** for the management of risks presented by group structures, such as contagion risk generated by intra-group exposures and arrangements;
- **Promoting consistency** in prudential requirements that apply to groups, to ensure the same risks are addressed consistently; and
- **Providing clarity on group capital requirements**, as well as APRA's approach to regulating and supervising different group structures.

APRA intends to release a Discussion Paper in early 2023 seeking feedback on 5 topics: financial resilience, governance, risk management, resolution and competition issues. Consultation will occur over 2023 and 2024, with any changes effective from 2025.

Superannuation trustees should remain abreast of any developments in relation to the group review given any proposed changes may have a significant impact.



Alternative Method to Calculate Tax Free Component for Military Pensions

19 September 2022
Instrument made

[LINK TO DETAILS](#)

The Deputy Commissioner of Taxation made an instrument that specifies an alternative method for calculating the tax-free component and taxable component of a superannuation benefit paid during the 2022-23 financial year that is a superannuation lump sum.

The instrument also revokes *Income Tax: Alternative method for calculating the tax free component and taxable component of a superannuation benefit paid during the 2021-22 financial year* for recipients of certain pensions under the Defence Force Retirement and Death Benefits Act 1973 and the Trust Deed.

The instrument provides an alternative method in that the superannuation benefit is taken to be paid in a way such that the tax-free component and the taxable component of the benefit bears the same proportion to the amount of the benefit that the corresponding component of a superannuation income stream.

This instrument is limited in application to benefits paid under the Defence Force Retirement and Death Benefits Act 1973 and the relevant Trust Deed.



SG & OTE (\$450 threshold)

24 October 2022
Announcement

[LINK TO DETAILS](#)

The ATO issued an addendum to SGR 2009/2, *Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary and wages'*.

The Addendum reflects changes made to subsection 27(2) of the *Superannuation Guarantee (Administration) Act 1992* by the *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Act 2022*. Section 27 of the SGAA specifies salary or wages that are not to be taken into account for the purposes of calculating an individual superannuation guarantee shortfall under section 19 of the SGAA.

The ATO also withdrew *Superannuation Guarantee Determination SGD 2003/5 Superannuation Guarantee Determination Superannuation guarantee: how do the exclusions under sections 27 and 28 of the Superannuation Guarantee (Administration) Act 1992 interact?* for the same reason.

Superannuation trustees note that these changes resulted from the removal of the \$450 threshold for the payment of superannuation guarantee.



Superannuation Guarantee Reward Payment Exemption

17 October 2022
Regulations made

[LINK TO DETAILS](#)

The Federal Executive Council made the *Superannuation Guarantee (Administration) Amendment (Aged Care Registered Nurses' Payment) Regulations 2022*, which amend the *Superannuation Guarantee (Administration) Regulations 2018* to ensure that an employer is not required to make additional superannuation contributions as a result of a payment paid to an employee under the Aged Care Registered Nurses' Payment to reward clinical skills and leadership.

In the 2021-22 Budget, the then Government announced that the Grant would be made to registered nurses working in aged care.

The Regulations apply to payments made under the Grant on or after 1 November 2022. Eligible employers may apply for the Grant on behalf of their eligible employees from 1 November 2022.

Superannuation trustees should consider the exemption as it may relate to any unpaid SG recovery activity (if the trustee is party to such an agreement).



GUIDANCE AND POLICY



Commonwealth Budget

25 October 2022
Policy Announcement

[LINK TO DETAILS](#)

The second **Commonwealth Budget** of 2022 was handed down by the Treasurer on 25 October. There were no new major superannuation related policies announced as part of the budget. There were, however, several ancillary policies or measures which may affect superannuation trustees:

- a **housing accord** intended to promote investment in social and affordable housing by investors including superannuation trustees;
- a **right to superannuation** within the National Employment Standards, which will give workers the power to pursue their unpaid superannuation as a workplace entitlement;
- alignment of the tax treatment of **off-market share buy-backs** by listed public companies with the treatment of on-market share buy-backs;
- increase in the amount of the Commonwealth **penalty unit** from \$222 to \$275 from 1 January 2023.

Several previously announced policies were discontinued.

Superannuation trustees should enjoy the moment of relative stability in policy settings, however, it may be short-lived – with the Quality of Advice Review, Your Future, Your Super review, and alignment of superannuation contribution payments with wages likely to be just around the corner.



Treasurer's Investor Roundtable

7 October 2022
Announcement

[LINK TO DETAILS](#)

The Treasurer announced the establishment of the Treasurer's Investor Roundtable which will seek to identify and unlock investment opportunities in areas of national priority.

The first Roundtable will be held in November and focus on:

- addressing barriers to investment within the housing sector;
- improving revenue streams and investor confidence in the project pipeline to meet risk and return preferences; and
- identifying partnership opportunities for government co-investment.

Future Roundtables will examine data and digitisation and clean energy.

Superannuation trustees should note the announcement and remain cognizant of any Roundtable outcomes as likely drivers of future government policy.



ASIC Cost Recovery Statement

21 October 2022
Statement

[LINK TO DETAILS](#)

ASIC released the 2021-22 Cost Recovery Implementation Statement which sets out the estimated levies by industry sector and subsector. For superannuation trustees, the estimated cost to ASIC for regulating the 95 RSE licensees in the superannuation subsector for the current financial year is \$37.9m, split between \$29.856m as a cost recovery levy and \$8.067m in statutory levies. The minimum levy payable is \$18,000, with an indicative levy of \$17.85 per \$1m of assets above the \$250m threshold.

ASIC's cost of regulating the superannuation subsector in 2020-21 was \$26.9 million. Final levies will be published in December 2022.

Superannuation trustees should note ASIC's estimated levies and ensure accounting teams have provisioned for these fees and levies and are aware of the dates that invoices will be issued.



APRA New Super Publication

20 October 2022
Statistics

[LINK TO DETAILS](#)

APRA released the inaugural Quarterly Superannuation Industry Publication which seeks to improve the transparency of the superannuation industry. The Publication uses expanded data collected within Phase 1 of the Superannuation Data Transformation (SDT) project. The new data collected and reported within the Publication includes the number and types of products and investment options, quarterly member demographics such as age, gender and account balances and improved classification of MySuper product asset allocations.

APRA introduced a staged release of the data given inevitable variations in quality and consistency of reporting within the initial data submissions. APRA intends to release new RSE investment data in the December 2022 edition (planned for release in February 2023), however APRA will complete analysis of the quality of reporting before publishing.

Superannuation trustees should review the new data available within the Publication and remain abreast of updated reporting information released within the staged implementation.



APRA Heatmaps FAQ

5 October 2022
FAQs

[LINK TO DETAILS](#)

APRA released new and updated Frequently Asked Questions (FAQs) on the 2022 MySuper and Choice Heatmaps which are due to be released in December 2022. Among the questions answered, APRA confirms:

- the applicable reporting standards used to populate each section of the Heatmap;
- how the Heatmaps support the Annual Performance Test outcomes;
- the effective dates for sections of the Heatmaps, confirming 'investment returns' and 'sustainability and member outcomes' metrics are based upon historical periods up to 30 June 2022 and 'fees and costs' metrics based upon data reported as at 1 October 2022; and
- how RG 97 Disclosing Fees and costs in PDSs and periodic statements has been incorporated into the Heatmaps.

Superannuation trustees should review the FAQs in preparation for the release of the Heatmaps in December to ensure the trustee has a full understanding of how the data has been produced and will be displayed. Consideration should be given to how the trustee will communicate Heatmap information to member enquiries.



APRA Annual Report

20 October 2022
Report

[LINK TO DETAILS](#)

APRA released their 2021-22 Annual Report which outlines how APRA delivered on the objectives of 'protected today' and 'prepared for tomorrow' over the past year.

The Annual Report includes the following performance highlights relevant for superannuation:

- Completion of the first annual performance test for MySuper products;
- Release of the first Choice products heatmap to sit alongside the existing MySuper heatmap;
- Completion of three thematic reviews conducted into strategic and business planning, fund expenditure and unlisted asset valuation practices across the industry; and
- Finalised CPS 511 Remuneration prudential standard.

Superannuation trustees should note the Annual Report and consider the focus areas for APRA in the current year.



Outsourcing Management APRA Insights

24 October 2022
Announcement

[LINK TO DETAILS](#)

APRA released its findings following a thematic review of the outsourcing practices of a sample of 10 trustees of retail superannuation funds.

This group was selected because related-party outsourcing arrangements have typically been more common for retail trustees, which tend to operate as part of larger conglomerate groups.

The review covered four key services – administration, financial advice, investment management and insurance – across the sampled trustees, with outsourcing contracts worth approximately \$1.2 billion per year.

APRA's key observations focus on three areas:

- Trustees' assessment of service providers' value-for-money;
- Trustees' measurement and monitoring of service providers' performance; and
- Trustees' oversight of service providers.

APRA identified either benchmarking or a competitive tender as being best practice for ensuring that arrangements were good value for money. Performance monitoring and resourcing an independent Office of the Trustee were seen as best practice in managing outsourcing to a related party.

Superannuation trustees relying on outsourced arrangements should review APRA's findings and consider any opportunities to uplift current practices.



Financial Services Law Reform

24 October 2022
Announcement

[LINK TO DETAILS](#)

The Australian Law Reform Commission (ALRC) released the *Financial Services Legislation: Interim Report B* which contains recommendations, proposals, and questions in relation to the reform of corporations and financial services legislation.

The proposals seek to make the Financial Services Law more accessible by:

- Codifying fundamental norms in the primary statute;
- Capturing all exemptions in the relevant regulations; and
- Providing thematic guides that apply the law in different contexts.

The ALRC also released prototype legislation to illustrate the ALRC's proposed legislative model for financial services regulation.

Superannuation trustees should ensure that compliance and legal teams are aware of the proposals and consider providing feedback on the ALRC's sample legislation.



Breach Reporting Insights

27 October 2022
Publication

[LINK TO DETAILS](#)

ASIC released its first publication of information lodged under the reportable situation regime. Key insights for the reporting period from 1 October 2021 to 30 June 2022 include:

- A significantly lower percentage (6%) of the licensee population lodged reports than expected, suggesting a lack of compliance;
- Remediation in many cases is taking too long to complete; and
- Staff negligence or error may be overused as the root cause.

As part of its 2022-23 priorities, ASIC will focus on improving the operation of the regime and work with industry stakeholders.

Superannuation trustees should review ASIC's report and consider their own reportable situation statistics in light of the key insights.



APRA Superannuation Data Transformation

21 October 2022
FAQs

[LINK TO DETAILS](#)

APRA released new and updated Frequently Asked Questions (FAQs) in relation to Phase 1 of the long-running Superannuation Data Transformation (SDT) program. The updated questions are:

- New FAQ 1.24 in relation to how RSE licensees should report Separately Managed Accounts or other Managed Discretionary Account Services in SRS 550.0;
- New FAQ 1.25 in relation to the revocation of pre-SDT Reporting Standards, with referral to a recent APRA [Letter to RSE Licensees](#) for further information;
- New FAQ 251.3 i in relation to how RSE licensees should report Insurance Cover Cost in SRF 251.3 where the default level of cover has been expressed as a percentage of salary;
- New FAQ 605 v in relation to how RSE licensees should report the Investment Option Name Text in SRF 605.0; and
- Updated FAQ 1.02 which sets out extended reporting due dates for a range of Reporting Standards.

APRA archived 6 FAQs that were incorporated into final standards, forms or instructions.

Superannuation trustees should review the FAQs to ensure alignment with expected practice, considering reporting timeframes as per FAQ 1.02.



ASIC Annual Report

14 October 2022
Report

[LINK TO DETAILS](#)

ASIC released the 2021-22 Annual Report which outlines the key regulatory and enforcement outcomes.

As relating to superannuation, ASIC note the following outcomes:

- Supporting significant regulatory change, including the implementation and engagement with industry on the design and distribution obligations; introduction of *Regulatory Guide 78 Breach Reporting* to support AFS licensees to comply with the new reportable situations regime; introduction of *Regulatory Guide 38 The hawking prohibition* to support the anti-hawking regime;
- Release of Info Sheet 271 Greenwashing in June 2022 to help investment and superannuation funds to avoid overstating the sustainability benefits of certain products; and
- Superannuation fund governance reviews including the re-valuation practices of unlisted assets by some trustees, conflict management policies and communications to members by trustees that failed the first Annual Performance Test.

ASIC also highlighted the core strategic projects for the next four years:

- Enforcing compliance of the reportable situation regime and product design and distribution obligations;
- Driving continued improvement in climate-related and sustainability disclosure and governance;
- Prioritising consumer protection through combating scam activity, reviewing crypto-asset regulation and driving active cyber risk management and operational resilience practices;
- Implementation of the Financial Accountability Regime (FAR) (subject to passing Parliament) jointly with APRA.

Superannuation trustees should review the priorities as set out by ASIC to allow planning and alignment with internal trustee projects and priorities.



Investment Options

07 October 2022
Article

[LINK TO DETAILS](#)

In a recent article – *Are your superannuation investment options consistent and 'true to label'?* – authored by ASIC's Superannuation Senior Executive Leader, Jane Eccleston, ASIC warned that "trustees should carefully consider whether the labels they use for their investment options support sound consumer understanding of the key features and risks."

As part of its surveillance activity, ASIC examined investment option labelling by superannuation trustees and identified the following issues that warrant trustee attention:

- The use of common risk labels in a manner that is inconsistent with the level of risk typical for that label.
- Too many less common, even unique, risk profile labels are being used, making comparing options more difficult for consumers.
- The use of confusing combinations of terms, including ones that are contradictory, such as 'Conservative Growth' and 'Moderately Conservative'.
- The use of product or brand names in labels for options that are not offered through investment platforms adds complexity without providing useful information.

In summary, ASIC recommended that trustees should avoid using: unusual or unique labels; common labels in a manner inconsistent with general market practice; and common terms in odd or contradictory combinations or mixed with marketing language.

Superannuation trustees should review the labelling of their investment options and consider ASIC's insights.



Financial Adviser Registration

01 November 2022
Media Release

[LINK TO DETAILS](#)

The Government has announced that it will delay the financial adviser registration requirement until 1 July 2023. The *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021* provided that all financial advisers who provide personal advice to retail clients be registered by 1 January 2023, which was proposed to occur through a two-stage process: registration with ASIC using the Financial Advisers Register and a second stage to begin when the Register transitions to the ATO as part of the Australian Business Registry Services.

Through engagement with industry, ASIC has identified ways to improve the operation of the stage one registration process with benefits for licensees. The delay will allow for implementation of the identified improvements.

Superannuation trustees who may also be advice licensees should note the announcement.



ENFORCEMENT ACTIVITY



H.E.S.T Australia Ltd v Attorney-General (Qld) & Anor; Mercy Super Pty Ltd v Attorney-General (Qld) & Anor [2022] QSC 221.

17 October 2022
Judgment

[LINK TO DETAILS](#)

In early 2022, [a decision of the New South Wales Supreme Court](#) (BTFM) brought to the forefront a potential implication of criminal liability. The decision provided protection to the trustee from possible criminal exposure under s. 249E of the *Crimes Act 1900* (NSW), that makes it a crime for a trustee to receive or to solicit a benefit from a person as an inducement or reward for the appointment of any other person as trustee.

This issue had not been widely considered previously and gave trustees reason to be cautious when contemplating an SFT, and to consider whether they should seek assent from the court to confirm that the transaction did not have criminal implications.

The trustee for the HESTA Superannuation Fund (HESTA) and the trustee for Mercy Super (Mercy) (collectively the Trustees) took the issue to the Supreme Court of Queensland in relation to the impending SFT between the two trustees in [H.E.S.T Australia Ltd v Attorney-General \(Qld\); Mercy Super Pty Ltd v Attorney-General \(Qld\) \[2022\] QSC 221](#).

The Trustees argued that the SFT did not involve an “appointment” of a trustee (does not involve replacement or substitution as contemplated by the Offence Provisions). It is instead “the transfer of trust assets and the beneficiaries’ interests in those assets to a different trust.”

Justice Kelly agreed and declared that an the proposed SFT was “not a substituted appointment for the purposes of [the Offence Provisions].”

Justice Kelly also determined that the Trustees are justified in pursuing the SFT, and in the event of error on the issue of appointment, “would be prepared to provide the required assent under the Offence Provisions.”



ASIC v Commonwealth Bank

29 September 2022
Judgment

[LINK TO DETAILS](#)

The Federal Court dismissed proceedings brought by ASIC alleging a breach of conflicted remuneration laws by Colonial First State Investments Limited (Colonial) when making payments to Commonwealth Bank of Australia (CBA) for the distribution of CBA’s MySuper product Essential Super.

ASIC alleged that, during the period 1 July 2013 to 30 June 2019, Colonial gave, and CBA accepted, monetary and/or non-monetary benefits which could reasonably be expected to influence financial product advice provided by CBA to its retail clients in relation to Essential Super.

ASIC claimed CBA contravened the prohibition against a financial services licensee accepting conflicted remuneration in accordance with s 963E of the *Corporations Act*. Within the judgment, Justice Anderson, stated:

“ASIC, in its case, sought to elevate form over substance which was inconsistent with the language and purpose of the Conflicted Remuneration Provisions. ASIC’s case ignored the circumstances in which the Essential Super product was developed and distributed, as well as the commercial realities of intercompany transfers within the same corporate group to effect an allocation of costs and revenues when a joint activity is undertaken by different business units and entities within the one corporate group.”

ASIC commenced civil penalty proceedings against CBA and Colonial on 22 June 2020. The conduct was identified and referred to ASIC by the Financial Services Royal Commission.



ASIC Interim Stop Order on Non-Compliant TMDs

30 September 2022
Interim Stop Order

[LINK TO DETAILS](#)

ASIC has made an interim stop order preventing Australasian Property Investments Limited (APIL) from offering or distributing the APIL Essential Retail Income Fund (the Fund) to retail investors because of a noncompliant target market determination (TMD).

ASIC made the interim stop order to protect retail investors from potentially investing in a fund that may not be suitable for their financial objectives, situation or needs. The fund is currently raising money to purchase a shopping centre. The PDS states the investment is not guarantee, monthly income distribution is based on assumptions, and investors are restricted from withdrawing their money until April 2029.

The corresponding target market for the fund includes investors:

- looking to invest in commercial properties with the prospect of capital growth and a secure income stream;
- who are 'cash rich' entities or retirees looking for a long-term capital investment along with a monthly return;
- with a 'buy and hold' strategy and do not require immediate access to capital; and
- with a need for preservation of capital that accrues capital gains/losses over the lifespan of the investment.

The interim order stops APIL from issuing interests in, giving a product disclosure statement for or providing general advice to retail clients recommending investment in the Fund. The order is valid for 21 days unless revoked earlier.

This follows several other DDO stop orders issued by ASIC to financial entities in relation to the offer and distribution of financial products to consumers as a result of deficiencies within TMDs. ASIC has targeted surveillances underway to check whether product issuers and distributors are complying with DDO and take swift action under DDO where required to prevent consumer harm.



ASIC acts against Greenwashing

27 October 2022
Infringement Notice

[LINK TO DETAILS](#)

ASIC has taken its first action for 'greenwashing' against listed energy company Tlou Energy Limited, which paid a total of \$53,280 to comply with four infringement notices issued over concerns about alleged false and misleading sustainability-related statements made to the ASX in October 2021.

ASIC Deputy Chair Sarah Court said in a media release that "ASIC is currently investigating a number of listed entities, super funds and managed funds in relation to their green credentials claims. Companies are on notice that ASIC is actively monitoring the market for potential greenwashing and will take enforcement action, including Court action, for serious breaches."



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